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3 Criminalising the violation of civil law standards

The Dutch criminalisation debate on breaches of sale contracts

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3.1 INTRODUCTION

The Central Bureau for Statistics of the Netherlands (*CBS*) reported that in the year 2014 3.5% of the Dutch population, which is an estimated 480,000 people, have been scammed while buying or selling goods or services online.[1] Under Dutch law, this is considered a breach of the civil standard of *pacta sunt servanda* (i.e.: agreements need to be kept). When the complainant seeks a legal remedy, he will initially have to rely on civil law. Accordingly, the *Hoge Raad* (*HR*; Dutch Supreme Court) and the District Court Noord-Holland decided that the mere intentional breach of a purchase agreement is not punishable under article 326 (*oplichting*; fraud) and 321 (*verduistering*; embezzlement) *Sr* (*Wetboek van Strafrecht*; Dutch Criminal Code).[2] These judgements raised the (parliamentary) question if an intentional breach of contract as such should invoke criminal liability.[3]

Criminal law is considered an *ultimum remedium*. The determination of whether and under which conditions certain conduct should be criminalised, is a first essential step in the criminalisation process. In some cases, enforcement through other areas of the law, such as administrative or civil law, could be considered a better solution for the problem at hand.[4] The question of whether certain conduct should be criminalised requires a careful weighing of arguments for and against criminalisation – the more so where it concerns conduct that is already tackled by civil law. How can it be justified to use the

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1 *CBS* Veiligheidsmonitor 2014, p. 75. R. *CBS* Sociaal economische trends 2015, p. 9. For an explanation of the research methods used in this report see p. 3-4.

2 HR 2 October 2012, ECLI:NL:HR:2012:BV8280. District Court Noord-Holland, 29 April 2013, ECLI:RBNHO:2013:BZ9266. See also the recent judgement of the *Hoge Raad* on the interpretation of article 326 *Sr*: *HR* 20 December 2016, ECLI:NL:HR:2016:2889.

3 *Annex to the Dutch Parliamentary Proceedings II (House of Representatives),* 2012/13, 1891. *Annex to the Dutch Parliamentary Proceedings II (House of Representatives),* 2012/13, 2711. *Annex to the Dutch Parliamentary Proceedings II (House of Representatives),* 2012/13, 2712.

4 Crijns 2012, p. 11; De Roos 1987, p. 60-61.

far-reaching measures of criminal law for ensuring compliance with the civil standard of *pacta sunt servanda*, i.e. to protect private interests between seller and buyer?

This paper analyses the underlying criminalisation principles in the Dutch criminalisation debate on breaches of sale contracts. This analysis aims to provide insight into the legitimacy of criminalising such a breach at the Dutch level, and – in a broader sense – into the legitimacy of criminalising the violation of civil law standards. Additionally, the paper will shed light on the interactions between and within criminal law, especially in respect of the interaction between criminal law and civil law in case of a breach of contract. That way, this paper will contribute to a better understanding of the law-making process with regard to criminalising the violation of civil law standards.

The paper starts by setting out the problem of breaches of sale contracts in the Netherlands, by briefly looking at the nature, prevalence and consequences of the conduct and the combat of breaches of sale contracts under the current legal framework (paragraph 2). Paragraph 3 discusses the Dutch criminalisation debate on breaches of sale contracts. It specifically focuses on the criminalisation debates concerning swindle (*flessentrekkerij*) and online trade fraud (*online handelsfraude*). Paragraph 4 elaborates on commonly accepted criminalisation principles. Paragraph 5 analyses which of the identified criminalisation principles are used in the criminalisation debates on swindle and online trade fraud (as discussed in paragraph 3) to substantiate the necessity of the criminalisation of breaches of sale contracts. The paper closes with some concluding remarks in paragraph 6.

3.2 The problem of breaches of sale contracts in the Netherlands

In the context of this paper a breach of a sale contract is defined as the intentional and complete non-performance of one of the main obligations of the seller (i.e. the transfer of ownership of the property, accessories included, the delivery of the good and conformity of the good) or the buyer (i.e. the payment of a price in money) under a purchase agreement, which is imputable to the non-compliant party.[5] Essentially, a breach of a sale contract entails the non-compliance of the civil standard *pacta sunt servanda*.[6] It takes place in the horizontal relationship between citizens. Breaches of sale contracts are not a new phenomenon. However, due to the introduction of the Internet, which

5 See articles 7:9, 7:17 *BW* (*Burgerlijk Wetboek*; Dutch Civil Code), article 7:26 *BW* respectively. See for an explanation of these obligations Schelhaas 2016, no. 25-31, no. 50 respectively.

6 Hijma 2016, no. 13.

rapidly digitalised the trade process, an increase in the number of cases has been reported over the last years.[7]

The following subparagraphs examine the nature, prevalence and consequences of breaches of sale contracts. In addition, it briefly sets out the possibilities to combat breaches of sale contracts under the current legal framework.

3.2.1 Nature, prevalence and consequences of breaches of sale contracts

In light of the nature of breaches of sale contracts, the breaches can be divided into two categories. The first category consists of breaches by the buyer, in which case the buyer does not pay for the goods that have been delivered to him. The second category consists of breaches by the seller. In that case, the buyer has paid for the goods, but the seller does not deliver the goods, or he delivers goods that are non-conform to the contract.[8] Delayed performance, by either seller or buyer, is not considered a breach of a sale contract.[9] In such a case, performance – although delayed – did take place. In many cases, it is mentioned that the non-compliant party intentionally breached the contract.[10] By intentionally breaching the contract, the party aims to gain a financial advantage; it serves an economic motive.[11] The breaches of sale contracts could occur in combination with (other) forms of criminal conduct.[12] If such is the case, either the criminal conduct is committed to facilitate the breach of a sale contract, such as identity fraud, or the breach of a sale contract facilitates the criminal conduct, such as bankruptcy fraud.

As mentioned above, the *CBS* reported that in the year 2014 3.5% of the Dutch population have been scammed while buying or selling goods or services online.[13] This is an increase in comparison to the previous years, where in 2012 a reported 2.9%[14] and in 2013 a reported 3.3%[15] of the Dutch

7 *Opportuun* 6 – June 2013, p. 6; Compare Bloem & Harteveld 2012, p. 48-49; and Van Wilsem 2012, p. 168-178.
8 *Opportuun 6* – June 2013, p. 6.
9 Bloem & Harteveld 2012, p. 48.
10 Van Kogelenberg 2014, p. 4, note 4; Dutch District Court Noord-Holland, 29 April 2013, ECLI:NL:RBNHO:2013:BZ9266; HR 9 December 2014, ECLI:NL:HR:2014:3546; Dutch District Court Amsterdam, 30 November 2009, ECLI:NL:RBAMS:2009:BK4742.
11 Van Kogelenberg 2013, p. 46.
12 Bloem & Harteveld 2012, p. 44; Blanco Hache & Ryder 2011, p. 45.
13 *CBS* Veiligheidsmonitor 2014, p. 75; *CBS* Sociaal economische trends 2015, p. 9.
14 'Victims of crime – personal characteristics 2012', *CBS* <statline.cbs.nl/Statweb/publication/?DM=SLNL&PA=81931NED&D1=0-19,22&D2=02&D3=0&D4=l&HDR=G2,G3,G1&STB=T&VW=T>.
15 *CBS* Veiligheidsmonitor 2013, p. 75.

population had fallen victim to breaches of sale contracts.[16] According to the *CBS*, this is a relative increase of 19% in the last two years.[17] The increase in the total number of breaches of sale contracts is due to an increase in the number of breaches by the seller. The number of breaches by the buyer remained relatively the same over the years.[18] The growing number of reported cases of breaches of sale contracts may be partly related to the growing number of online shoppers. Buyers, who have been buying online for a longer time, were scammed more often as well.[19]

One of the consequences of a breach of a sale contract is that it leaves the creditor with a financial loss. With an estimated average of € 300 per individual, individual damages are usually low. In the Netherlands, which had 480,000 creditors in 2014, the total amount of damages is an estimated € 135 million.[20] Product protection insurances may offer a solution to the creditor, but diverges the problem and costs to insurers and banks.[21] In addition, breaches of sale contracts damage the trust in (online) trade, resulting in fewer online purchases and interfere with the good functioning of the e-commerce market, damaging the economy as a whole.[22] A last consequence is that creditors are left with the feeling that they have been scammed and could endure feelings of shame. If no action is taken against reported breaches, people could eventually lose faith in the justice system.[23]

16 *CBS* Veiligheidsmonitor 2014, p. 75. Compare Bloem & Harteveld 2012, p. 33-34: They found an increase in the number of cases of breaches of sale contracts from the year 2007 until 2010. In 2011, there was a slight decrease, which might be related to the introduction of *Landelijk Meldpunt Internetoplichting* (*LMIO*; National Registration Centre Internet Fraud).

17 *CBS* Sociaal economische trends 2015, p. 6.

18 An estimated 0.1-0.2% of the breaches of sale contracts is due to non-compliance by the buyer. See *CBS* Veiligheidsmonitor 2014, p. 75. *CBS* Sociaal economische trends 2015, p. 6.

19 *CBS* Sociaal economische trends 2015, p. 6.

20 Compare Bloem & Harteveld, p. 60.

21 Kosse 2010, p. 9-10.

22 Mayer, Davis & Schoorman 1995, p. 712: the widely accepted definition of trust is the 'willingness of a party to be vulnerable to the actions of another party based on the expectations that the other will perform a particular action important to the trustor, irrespective of the ability to monitor or control that other party'; Greiner & Wang 2010, p. 108-109; Gefen & Pavlou 2012, p. 942: in the context of online marketplaces, buyers have trust in the community of sellers and not in an individual seller.

23 Bloem & Harteveld 2012, p. 31 and 52; Blaco Hache & Ryder, p. 41.

3.2.2 The combat of breaches of sale contracts under the current legal framework

Throughout the years, the Dutch legislator and judiciary have been reluctant to provide criminal protection against the mere breach of a sale contract.[24] The legal framework would provide sufficient protection to the creditor to ensure that he would get compensation for his losses. The following subparagraphs examine the possibilities under the current legal framework to combat breaches of sale contracts.

3.2.2.1 Civil protection against breaches of sale contracts

Civil law offers various remedies to the creditor in case of a breach of a sale contract. The main remedy available to the creditor is demanding performance under article 3:296 *BW* (*Burgerlijk Wetboek*; Dutch Civil Code). In addition, the buyer has the right to specific performance under article 7:21 *BW*, such as delivery of the missing parts, repair and replacement.[25] According to article 7:20 *BW*, the buyer may also demand that any encumbrance or restriction, which has not been agreed upon, is lifted from the good. If the creditor has to perform first and he has reasonable fear that the debtor will not comply with his obligations under the purchase agreement, the creditor has a right of stoppage (article 6:262-6:264 *BW*).[26]

If performance is permanently impossible or the debtor is in default, secondary remedies become available to the creditor, such as damages (article 6:74 *BW*) and termination of the contract (article 6:265 *BW*). Additionally, the seller has the right of reclamation (article 7:39 *BW*). This remedy primarily focuses on the recovery of the delivered goods and, secondarily, terminates the contract.[27]

In theory, the voidable act of civil deceit (article 3:44 *BW*) could provide some protection against a breach of a sale contract as well. The creditor will have to plea that the false representation as a bonafide buyer or seller induced him to conclude the contract. If the creditor's plea is successful, the purchase agreement will be voidable.[28] However, such an argument may be easily rebutted by arguing that the creditor should have conducted some research

24 E.g. Van den Hout 1993, p. 48-49, 53 *et seq.*; Smidt 1891, p. 545 *et seq.*; HR 14 May 1991, *NJ* 1991/750: this judgement was confirmed in 2014, see HR 9 December 2014, ECLI:NL:HR:2014:3546; and HR 20 december 2016, ECLI:NL:HR:2016:2889.

25 See for a detailed examination of the right to specific performance Mak 2009.

26 In such a case the seller will postpone delivery of the good, the buyer will postpone payment of the price (see article 7:27 *BW*).

27 Asser/Hijma 7-1* 2013, no. 610.

28 Asser/Hartkamp & Sieburgh 6-I* 2012, no. 636-637,

into the credibility of the debtor or that the 'average' citizen under the given circumstances would not have entered the contract.[29]

Next to these substantive remedies, civil law provides some procedural measures to creditors. In case of multiple breaches of sale contracts, which involves multiple creditors, the creditors may choose to unite and start a group action against the buyer, by combining power of attorney (article 3:60 *et seq. BW*) or mandate agreements (article 7:414 *BW*).

Table 2.1 provides a schematic overview of the available remedies in case of a breach of a sale contract by buyer and seller.

Table 2.1: Remedies available to breaches of sale contracts by buyer and seller

Type of breach of sale contract / Remedy	Breach of a sale contract by buyer	Breach of a sale contract by seller
Demand performance (art. 3:296 *BW*)	X	X
Specific performance (art. 7:21 *BW*)		X
Lift encumbrance (art. 7:20 *BW*)		X
Right of stoppage (art. 6:262-6:264 *BW*)	X	X
Damages (art. 6:74 *BW*)	X	X
Termination (art. 6:265 *BW*)	X	X
Right of reclamation (art. 7:39 *BW*)	X	
Voidable act: civil deceit (art. 3:44 *BW*)	X	X

3.2.2.2 Criminal law protection against breaches of sale contracts

In principle, the Dutch criminal law does not offer protection against a (mere) single breach of contract. Nevertheless, if the debtor used deceitful means, such as a false name, a false capacity, cunning manoeuvres or a tissue of lies, to induce the creditor to hand over the goods or payment in price, the debtor could be held criminally liable under article 326 *Sr*. A mere lie, such as (merely) presenting yourself as a bonafide buyer or seller does not suffice. It requires an additional act of the buyer or seller. Next to that, the use of the deceitful mean has to induce the creditor to hand over the good. This is known as the causality requirement.[30] In case the seller intentionally breaches his obligation of conformity of the goods he may be held criminally liable under article 329 *Sr* (*verkopersbedrog*; deceit by the seller). Article 329 *Sr* criminalises the act of intentionally delivering an object other than the specifically specified object the buyer purchased or employing cunning manoeuvres with respect to the nature, condition, quality or quantity of the goods delivered.

If the buyer (merely) breached multiple purchase agreements, criminal law offers explicit protection to the seller. Under article 326a *Sr*, the buyer who makes a profession or a habit out of purchasing goods with the intention of ensuring that they are at his or another's disposal without paying for them

29 Asser/Hartkamp & Sieburgh 6-I* 2012, no. 254; Hijma 1992, p. 59-60.

30 See on the interpretation of article 326 *Sr: HR* 20 December 2016, ECLI:NL:HR:2016:2889.

in full, is criminally liable for swindle. Swindle does not require the use of a deceitful mean. It requires that the buyer (had the intention to) repetitively purchase(d) goods without paying for them in full.[31] The Dutch criminal law does not yet provide protection against multiple (mere) breaches of sale contracts by the seller, other than the breach of conformity of the good.[32] In case the seller used a deceitful mean, he could be held criminally liable for fraud under article 326 *Sr*.

Table 2.2 provides a schematic overview of the criminal protection the Dutch criminal law offers in case of a breach of a sale contract by buyer and seller.

Table 2.2: Criminal liability in case of breaches of sale contracts by buyer and seller

Type of breach of sale contract / Criminal liability	Single breach by buyer	Multiple breaches by buyer	Single breach by seller	Multiple breaches by seller
Fraud (art. 326 *Sr*): no use of a deceitful mean				
Fraud (art. 326 *Sr*): use of a deceitful mean	X	X	X	X
Swindle (art. 326a *Sr*)		X		
Deceit by seller (art. 329 *Sr*): non-conformity of the good			X	X

3.3 THE DUTCH CRIMINALISATION DEBATE ON BREACHES OF SALE CONTRACTS

Within the criminalisation debate on unfair conduct, one of the main questions has been to what extent people should be protected against deceit. Throughout the years, the basic assumption has been that the legislator should abstain from introducing a criminal prohibition of deceit *in genere*. Criminalising deceit in general would bear the risk that the legislator would exceed the scope of his competence to criminalise certain acts. Instead the bill of the *Wetboek van Strafrecht* introduced a separate Title XXV, *Bedrog* (deceit) which contained the criminal act of fraud, by the use of specific deceitful means (article 326 *Sr*).[33] As a consequence, not all forms of deceitful conduct and all breaches of contract invoke criminal liability.[34] Accordingly, the *Hoge Raad* gives a restrictive interpretation of the prohibition of fraud: 'by specific, sufficiently severe forms of deceitful conduct, the perpetrator wants to misrepresent facts

31 Noyon, Langemeijer & Remmelink, artikel 250 Sr, no. 7; Stijns-Schepers, p. 64; Vegter 1990, p. 47-48.
32 See article 329 Sr; See also Noyon, Langemeijer & Remmelink, artikel 329 Sr.
33 Smidt 1891, p. 545; HR 20 December 2016, ECLI:NL:HR:2016:2889.
34 HR 20 December 2016, ECLI:NL:HR:2016:2889.

so he can take advantage of the situation at hand'.[35] Nevertheless, in some cases the criminal law does offer protection against less severe forms of deceitful conduct, such as swindle and the proposed criminalisation of online trade fraud.

The following subparagraphs set out the reasoning with respect to criminalising breaches of sale contracts, especially the criminalisation of swindle and online trade fraud. By examining the reasoning with respect to criminalising breaches of sale contracts, the main arguments to substantiate the necessity of such a criminalisation can be identified. It sheds light on how it could be justified to use the far-reaching measures of criminal law for ensuring compliance with the civil standard of *pacta sunt servanda*.

3.3.1 Swindle

Swindle or *flessentrekkerij* was criminalised in 1928. Article 326a *Sr* penalises anyone who makes a profession or habit of purchasing goods with the intention of ensuring that they are at his or another's disposal without paying for them in full. It penalises the non-compliant buyer. The initial proposal was to criminalise swindle under article 326 *Sr* by adding another deceitful mean, namely: 'by raising the presumption of creditworthiness'. The immediate cause for the proposed amendment were the many cases in which 'ordinary people', who exercised a sufficient level of care, were induced to hand over any property without the use of a deceitful mean. Article 326 *Sr* did not provide adequate protection against these types of conduct, since the law required the victim to be induced by the use of a deceitful mean. However, in case the creditor did exercise sufficient care, and the debtor persuaded the creditor to enter a purchase agreement by raising the presumption of creditworthiness, the debtor should be held criminally liable. According to the Minister, research into someone's solvability and integrity is not always possible in light of the short period of time to conclude a sale. Therefore, the criminalisation of swindle under the fraud act would be in the interest of prosperous trade. The proposal was withdrawn shortly after its announcement.[36]

The merchants' growing wish to criminalise the act of the intentional breach of a purchase agreement by the buyer, led to a new proposal to criminalise swindle in 1927. The bill proposed to adopt a separate article 326a to criminal-

35 HR 20 december 2016, ECLI:NL:HR:2016:2889: 'de verdachte [wil] door een specifieke, voldoende ernstige vorm van bedrieglijk handelen bij een ander een onjuiste voorstelling van zaken in het leven (…) roepen teneinde daarvan misbruik te kunnen maken'.

36 *Annex to Dutch Parliamentary Proceedings II (House of Representatives)*, 1904/05, 80, no. 2, p. 9; *Annex to Dutch Parliamentary Proceedings II (House of Representatives)*, 1904/05, 80, no. 3, p. 33-34; Van den Hout 1993, p. 56-57: the bill, which entailed a full revision of the *Wetboek van Strafrecht* was – according to the House of Representatives – not urgently needed.

ise swindle.[37] In contrast to deceit, the deceitful act of swindle should cover the declared will of the buyer, which he is not intending to fulfil, instead of the use of a deceitful mean.[38] The bill raised the question of whether criminal law should provide protection against such acts. Opponents of the bill argued that someone who offers the possibility to purchase goods on credit to strangers should be aware of the risk of deceit and should bare this risk on his own account. It was suggested that if merchants wish to have protection against non-compliant buyers, the merchants should establish a collective of creditors themselves.[39] The then Minister of Justice persevered, stating that criminalisation would be in the best interest of the merchants. Competition forces merchants to a readily sale, otherwise they will lose their clients to the competitor. In that context, delivering goods on credit does not represent reckless or careless behaviour.[40] In light of the foregoing, one may conclude that the criminalisation of swindle is not based on the severity of the conduct. The criminalisation is justified, because there is a high number of cases, which causes great damage to trade, and intentional non-compliance by the buyer is difficult to prevent by the merchants.[41] Other remedies, such as civil remedies (e.g. demand performance) or criminal regulations (e.g. deceit) did not provide adequate protection against this conduct.[42]

3.3.2 The proposed criminalisation of online trade fraud

As stated in paragraph 2.2, Dutch criminal law does not penalise non-compliant sellers, unless the seller made use of a deceitful mean. According to the Minister of Security and Justice, not all cases of unfair trading should invoke criminal liability. Only in severe cases a criminal approach should be taken. However, what qualifies as a 'severe case' remains unclear. On the one hand the Minister defines severe cases as cases which concern for example large amounts of money or large numbers of victims.[43] On the other hand, he takes the position that the choice in legal system should not depend on the number of victims, but should be determined by the nature of the conduct.[44] He acknowledges that Internet trading comes with risks for both seller

37 *Dutch Parliamentary Proceedings II (House of Representatives)*, 1927, W 11608, p. 1.
38 *Dutch Parliamentary Proceedings II (House of Representatives)*, 1927, W 11725, p. 1.
39 *Dutch Parliamentary Proceedings II (House of Representatives)*, 1927, W 11682, p. 1; See also Van Den Hout 1993, p. 59-60.
40 *Dutch Parliamentary Proceedings II (House of Representatives)*, 1927, W 11725, p. 1; See also Van Den Hout 1993, p. 59-60.
41 *Dutch Parliamentary Proceedings II (House of Representatives)*, 1927, W 11608, p. 1-2; See also Van den Hout 1993, p. 58.
42 Van den Hout 1993, p. 58-59.
43 *Annex to Dutch Parliamentary Proceedings II (House of Representatives)*, 2012/13, 1891.
44 *Annex to Dutch Parliamentary Proceedings II (House of Representatives)*, 2012/13, 2712.

and buyer. Not all risks should, however, be protected through criminal law. People have their own responsibility when closing a purchase agreement. Consequently, the creditor is – in the first place – responsible to recover any losses from the debtor.[45] Besides, the Internet provides different methods to minimise the risks when trading on the Internet, and trading websites have their own interest to minimise unfair trading. In addition, when people are trading under their own name and with their own bank account number, one could easily apply civil remedies in case of a breach of a sale contract. Furthermore, if there are multiple creditors, people may choose to unite themselves and start a class action against the non-compliant buyer or seller.[46]

In 2014, the Minister changed his position on the matter. In the future, sellers who repeatedly do not deliver paid for goods will be held criminally liable. In light of current social trends, in which people increasingly use the Internet to trade, suitable solutions should be found against (intentional) repetitive breaches of sale contracts. According to the proposed bill, the problem of so-called online trade fraud has developed from a problem at private level to a problem at public level. In 2013, 3.1% of the Dutch population has been defrauded when buying on the Internet. According to *Landelijk Meldpunt Internet Oplichting* (*LMIO*; National Registration Office Internet Fraud), it received 44,000 reports on Internet fraud, in which a total of 7.9 million euro of damages was reported in 2014.[47] Under the current legal system, creditors often remain empty handed, because they are unable to trace the debtor themselves and the conduct is not punishable under criminal law.[48] By penalizing the non-compliant sellers, it will be easier for creditors to get compensation and to monitor unfair traders.[49] As a result, the Minister of Security and Justice proposed to criminalise the breach of a sale contract by the seller, that is to say the non-compliance with the obligation to deliver the goods that have been paid for. The proposed bill introduces a new article to the *Wetboek van Strafrecht*, which penalises any person who makes a profession or habit of selling goods or rendering services by the use of a computerised device or system on payment, with the intention to obtain the payment, for himself or for another, without fully delivering the good or service. The act is qualified

45 *Annex to Dutch Parliamentary Proceedings II (House of Representatives),* 2012/13, 1891; *Annex to Dutch Parliamentary Proceedings II (House of Representatives),* 2012/13, 2712.

46 *Annex to Dutch Parliamentary Proceedings II (House of Representatives),* 2012/13, 2711; *Annex to Dutch Parliamentary Proceedings II (House of Representatives),* 2012/13, 2712.

47 *Dutch Parliamentary Papers II (House of Representatives)*, 2015/16, 34372, no. 3, p. 73.

48 *Dutch Parliamentary Papers II (House of Representatives)*, 2015/16, 34372, no. 3, p. 73-75.

49 'Opstelten investeert in bestrijding computer criminaliteit', *Rijksoverheid.nl* 25 februari 2014, <www.rijksoverheid.nl/nieuws/2014/02/25/opstelten-investeert-in-bestrijding-computer-criminaliteit.html>.

as *online handelsfraude* (online trade fraud).[50] The proposed article 326e *Sr* aims to protect the trust people have in trade.[51]

In light of scarce resources, enforcement of civil law standards deserves particular attention. In case of trade fraud, the legislator proposes a dual approach to the problem: prevention and criminal penalties. To prevent trade fraud, the Dutch public prosecution service (*openbaar ministerie; OM*) and the Dutch police have concluded a covenant with *marktplaats.nl*[52] in 2008 and with *marktplaats.nl*, *LMIO* and the *Nederlandse Vereniging van Banken* (Dutch Association of Banks) in 2014. In these covenants, the parties agreed on preventative measures, effective advice on online trading,[53] and information exchange in cases of breaches of sale contracts. In case of multiple reports where the same bank account was used, banks may take measures against their client, such as addressing the client about his online conduct, freezing the bank account or terminating the relation with the client. *Marktplaats.nl* may delete advertisements, freeze accounts or caution the user about his conduct. In addition, *marktplaats.nl* proactively reports cases of breaches of sale contracts to the police or *LMIO*.[54] In turn, the police and the prosecution service agreed to take up at least 1600 cases concerning fraud each year. Of these 1600 cases, fraud involving the use of the Internet deserves specific attention. Reports of breaches of sale contracts are analysed by the *LMIO*, which selects cases to prosecute based on the number of reports against one bank account or person,[55] the amount of damages, the age of the suspect and/or personal circumstances of the suspect. It may also choose not to select a case for prosecution, if non-criminal intervention would be more effective.[56]

50 The proposed article penalises '[h]ij die een beroep of een gewoonte maakt van het door middel van een geautomatiseerd werk verkopen van goederen of verlenen van diensten tegen betaling met het oogmerk om zonder volledige levering zich of een andere van de betaling van die goederen of diensten te verzekeren.' See *Dutch Parliamentary Papers II (House of Representatives)*, 2015/16, 34372, no. 2, p. 3.

51 Compare *Dutch Parliamentary Papers II (House of Representatives)*, 2015/16, 34 372, no. 3, p. 73.

52 *Marktplaats.nl* is a Dutch trading platform on which users may offer and buy goods.

53 See 'Veilig en succesvol', *Marktplaats.nl* <www.marktplaats.nl/i/help/veilig-en-succesvol/>: Marktplaats.nl advices people, amongst other things, to find products in the area near to you and to check the seller online by googling his details.

54 *Dutch Parliamentary Papers II (House of Representatives)*, 2016/17, 34372, no. 6, p. 118-119. See also *Dutch Parliamentary Papers II (House of Representatives)*, 2015/16, 34372, no. 3, p. 73.

55 Criminal investigations start when there are approximately 180 reported breaches of sale contracts against one person or bank account; See *Dutch Parliamentary Papers II (House of Representatives)*, 2015/16, 34 372, no. 3, p. 73.

56 *Dutch Parliamentary Papers II (House of Representatives)*, 2016/17, 34372, no. 6, p. 119.

3.4 Commonly accepted criminalisation principles

The first essential step in the criminalisation process is the determination of whether and under which conditions certain conduct should be criminalised. The determination whether certain conduct should be criminalised, requires careful weighing of arguments for and against criminalisation. To be able to balance the arguments for and against criminalisation, many legal scholars have formulated different and various grounds for criminalisation over the years, such as Feinberg,[57] Haveman,[58] De Roos[59] and Haenen.[60] Criminalisation principles are guidelines for the legislator in the law-making process; they could be used to legitimise and facilitate the criminalisation process. However, the legislator is not obliged to use criminalisation principles when criminalising certain conduct.[61] Within the scope of this paper the discussion of the commonly accepted criminalisation principles is limited to the principles as determined by De Roos and modified by Haenen, namely i) the threshold principles: harm and wrong, ii) the moderating principles: proportionality, subsidiarity and efficiency, and iii) legality. The set of principles of De Roos is considered one of the leading sets of criminalisation principles at the Dutch level.[62]

3.4.1 Primary principles: threshold principles

Haenen considers the principles of harm and wrong as the threshold principles for criminalisation.[63] In other words, criminalisation is only justified in case of '*wrongful* conduct that causes some (risk of) *harm*'.[64] The harm principle entails a rational test and protects against absolute moralism. The principle is met when the conduct has a negative effect on something substantial, such as other individuals' physical or property interest (e.g. murder, theft), public interest (e.g. the integrity of the financial system in case of money laundering)

57 Feinberg 1984.
58 Haveman 1998.
59 De Roos 1987.
60 Haenen 2014.
61 Cleiren 2012, p. 8-12. Even though the legislator is not bound to use a set of criminalisation principles in the legislative process, he did formulate some guidelines to improve the quality of legislation, by looking into for example the effectiveness, subsidiarity, proportionality and legitimacy of the proposed legislation. See *Dutch Parliamentary Papers II (House of Representatives)*, 1990/91, no. 1-2 (*Zicht op wetgeving*); See also *Dutch Parliamentary Papers II (House of Representatives)*, 2000/01, no. 2 (*Wetgevingskwaliteitsbeleid*).
62 Cleiren *et al.* 2012, p. 2.
63 Haenen 2014, p. 122-123 and 135; Compare De Roos 1987, p. 53-78: he emphasises the importance of the harm principle, and does not use a dual approach of wrongfulness and harmfulness.
64 Haenen 2014, p. 135.

and even the risk of harm (e.g. possession of an unlicensed weapon).[65] The wrongfulness principle prevents criminalisation of conduct that only causes remote harm:[66] 'A wrong is the deliberate, reckless or negligent violation of the interests of other persons (or the state)'.[67] Thus, it results from the harmful conduct.[68] Punching someone in the face is harmful (i.e. pain/injury to the face) and – consequently – wrongful conduct. However, when punching someone in the face as part of a boxing match, the violation of a person's interest stays out; within the context of a boxing match one has the permission to punch the competitor in the face, so no wrong is done. The government should abstain from criminalising conduct that only causes minimal or *private* wrongful conduct that causes some (risk of) harm.[69] The threshold principles compel the legislator to motivate why the conduct at hand is wrongful and harmful, by addressing its aetiology, prevalence, consequences and assessment of the available legal remedies.[70]

3.4.2 Secondary principles: moderating principles

Once the threshold criteria are satisfied, the legislator should examine a set of moderating principles. These are the principles of proportionality, subsidiarity and efficiency. The moderating principles express the idea that the use of criminal law should not be taken lightly.[71] The proportionality principle examines whether the reaction to the conduct is proportionate to the harm the conduct causes. It requires a dual approach. On the one hand the use of criminal law should be proportionate to the severity of the crime. On the other hand, the severity of the penalty should be proportionate to the severity of the crime.[72] Closely related to the principle of proportionality is the subsidiarity principle. Criminal law is considered a last resort or *ultimum remedium*. In some cases, enforcement through other (less intrusive) areas of the law, such as administrative or civil law, could be considered a better solution for the problem at hand (i.e. external subsidiarity).[73] The principle requires careful balancing of the (dis)advantages of using criminal law (e.g. deterrent effect and stigmatising effects) versus the (dis)advantages of using other means of intervention (e.g. costs and length of the procedure).[74] Furthermore, the legis-

65 Haenen 2014, p. 123-124; De Roos 1987, p. 42-44.
66 Haenen 2014, p. 122-123.
67 Seher 2014, p. 260.
68 Haenen 2014, p. 126.
69 The legislator is competent to act in case of a public wrong. See Haenen 2014, p. 126.
70 Haenen, p. 135; Compare De Roos 1987, p. 56.
71 Haenen 2014, p. 127.
72 De Roos 1987, p. 70-71; Haenen 2014, p. 128.
73 Crijns 2012, p. 11; De Roos 1987, p. 60-61; Haenen 2014, p. 129.
74 Haenen 2014, p. 129-131; Compare De Roos 1987, p. 68-70.

lator should evaluate whether the conduct could fall within the scope of existing criminal prohibitions (i.e. internal subsidiarity).[75] The third moderating principle is the principle of efficiency. It requires that the criminal act is prosecutable; it should provide sufficient legal certainty (see below) and should not cause any evidentiary problems.[76] Additionally, the efficiency principle requires the criminal prohibition to be effective. It should be possible to detect the crime, and by extension, the criminal justice system should have the capacity to enforce the criminal prohibition.[77] Lastly, the efficiency principle requires that the criminal approach to the conduct has a preventative effect.[78]

3.4.3 Legality

The final principle that must be taken into account when criminalising certain conduct is the legality principle, which requires that – beforehand – any criminal offence is defined sufficiently clear and precise within an act, statute or regulation.[79] In light of the question of whether certain conduct should be criminalised, the emphasis lays on the *lex certa* principle or legal certainty.[80] According to the *lex certa* principle, the criminal offence should be defined as sufficiently clear and precise as possible. Citizens should be able to know the legal consequences of their actions, i.e. which acts invoke criminal liability.[81] It is impossible to reach complete legal certainty within the law: many criminal acts 'are inevitably couched in terms which are vague and whose interpretation and applications are questions of practice.'[82] It prevents hypertrophy of laws, which obstructs the clarity of the system.[83] Consequently, the legislator should determine – after the threshold and moderating criteria have been satisfied – whether it is possible to describe the act as sufficiently clear and precise as possible. If not, the legislator should determine whether a judge would be able to interpret the elements of the prohibition, to obtain the required level of clarity and preciseness. In case it is impossible for the judge to interpret the elements in such a way, the legislator should abstain from criminalisation of the conduct.[84]

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75 Haenen 2014, p. 131.
76 De Roos 1987, p. 76-77; Haenen 2014, p. 131-132.
77 De Roos 1987, p. 77-78; Haenen 2014, p. 132.
78 De Roos 1987, p. 78-79; Haenen 2014, p. 132.
79 De Hullu 2015, p. 83-113; Groenhuijsen 1987, p. 15; Haenen 2014, p. 132-133: the legality principle consists out of four norms: i) *nullem crimen sine lege scripta,* ii) *praevia,* iii) *certa* and iv) *stricta*; See within this context also Altena-Davidsen 2016.
80 Haenen 2014, p. 132-134; Compare De Roos, p. 73-75.
81 Haenen 2014, p. 133; De Hullu 2015, p. 94-95.
82 European Court of Human Rights (ECHR), 26 April 1979, no. 6538/74 (Sunday Times vs. the United Kingdom).
83 Groenhuijsen 1987, p. 15; See also Haenen 2014, p. 133.
84 Haenen 2014, p. 134.

3.5 The underlying principles in the criminalisation debate on breaches of sale contracts

The basic assumption has been that the legislator should abstain from introducing a criminal prohibition of deceit *in genere*. As a consequence, not all forms of deceitful conduct and all breaches of contract invoke criminal liability. Citizens have their own responsibility when entering a contract. Consequently, citizens should bare the risk of deceit when extending credit to strangers. For acts to fall within the scope of criminal liability the act should qualify as a specific, sufficiently severe form of deceitful conduct, by which the perpetrator wants to misrepresent facts so he can take advantage of the situation at hand. Thus, criminalising less severe forms of deceitful conduct requires solid grounds as to why these acts should invoke criminal liability.

The criminal prohibition of swindle contains the criminalisation of a less severe form of deceitful conduct. The justification for the criminalisation of swindle was solely based on three criminalisation principles: the principles of harm and wrong and the subsidiarity principle. The bill addresses the principles of harm and wrong by mentioning the high number of cases of non-compliant buyers: 'swindlers cause dozens of victims each year. They are the leeches of society'.[85] In contrast to the proposal to extend the scope of article 326 *Sr* by adding the deceitful mean of 'raising the presumption of creditworthiness', the parliamentary papers on article 326a *Sr* do not mention the damaging effect the conduct has on trade. Nevertheless, the effects non-compliant buyers had on trade must have been one of the reasons to criminalise swindle. According to the bill, the law aims to protect the merchants against swindlers, and thus (implicitly) aims to protect trade.[86] Moreover, the parliamentary proceedings emphasise the lack of adequate protection against the conduct at hand and the inability of merchants to prevent the conduct themselves. The reasoning relates to the principle of subsidiarity. It argues on the one hand why other less intrusive measures and areas of the law (i.e. collective of creditors, civil law respectively) do not provide adequate protection (external subsidiarity) and on the other hand why the current criminal provisions (i.e. article 326 *Sr*) do not provide a solution for the problem at hand (internal subsidiarity).[87] Other underlying criminalisation principles could not be identified in the criminalisation debate on swindle.

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85 Translated from *Dutch Parliamentary Proceedings II (House of Representatives)*, 1927, W 11608, p. 1: '[d]e flesschentrekkers maken jaarlijks ettelijke slachtoffers. Het zijn parasieten op den middenstand.'

86 *Dutch Parliamentary Proceedings II (House of Representatives)*, 1927, W 11725, p. 1: 'Het [the bill, SSB] wil de mogelijkheid openen de methoden der leden van dit gilde met straffe hand te weren en met name den middenstand daartegen beter dan tot dusver te beschermen.'

87 *Dutch Parliamentary Proceedings II (House of Representatives)*, 1927, W 11608, p. 1-2; *Dutch Parliamentary Proceedings II (House of Representatives)*, 1927, W 11725, p. 1.

Closely related to the criminalisation of swindle is the proposed criminalisation of online trade fraud. In the Dutch criminalisation debate on online trade fraud four criminalisation principles could be identified: the principles of harm and wrong, the subsidiarity principle and the principle of efficiency. In contrast to the criminalisation of swindle, the proposed bill discusses the harmfulness and wrongfulness of the conduct in greater detail by addressing the prevalence (i.e. the number of people of the Dutch population who have been defrauded when buying on the Internet and the number of reported cases of Internet fraud) and the reported total amount of damages caused by online trade fraud (i.e. 7.9 million euro).[88] In this light, the proposed bill states that the problem of breaches of sale contracts by the seller developed from a problem at private level to a problem at (a more) public level.[89] Although the harmfulness and wrongfulness of the conduct were discussed in greater detail, the bill draws more attention to the subsidiarity principle and the efficiency principle.

The proposal argues why the criminal law is able to offer better protection to the conduct at hand (i.e. the police is capable to investigate breaches of sale contracts by the seller by using procedural measures and collecting all reported cases of online trade fraud, and – as follows – to trace the perpetrator) and – in addition – provides adequate measures to the creditor to get compensation (i.e. article 51f *Wetboek van Strafvordering; Sv,* Dutch Criminal Procedural Code), addressing the principle of external subsidiarity. Next to that, the proposed bill addresses the principle of internal subsidiarity by arguing why other criminal measures are inadequate to combat the conduct (i.e. article 326 *Sr*).[90] Lastly, the plea for criminalisation touches upon the principle of efficiency. The Minister states that in light of scarce resources only severe cases of online trade fraud may be prosecuted. In other words, prosecuting all cases of online trade fraud will overload the criminal justice system. He therefore advocates a dual approach of prevention and criminal penalties.[91] Within the criminalisation debate on online trade fraud no other underlying criminalisation principles could be identified.

3.6 Final remarks: a careful balancing of arguments for and against criminalisation?

This paper examined the underlying criminalisation principles in the Dutch criminalisation debate on breaches of sale contracts. It posed the question of

88 *Dutch Parliamentary Papers II (House of Representatives)*, 2015/16, 34372, no. 3, p. 73.

89 *Dutch Parliamentary Papers II (House of Representatives)*, 2015/16, 34372, no. 3, p. 73: 'Gedurende de afgelopen jaren vormt de zogenaamde online handelsfraude (of: internetoplichting) in toenemende mate een maatschappelijk probleem.'

90 *Dutch Parliamentary Papers II (House of Representatives)*, 2015/16, 34372, no. 3, p. 73-75.

91 *Dutch Parliamentary Papers II (House of Representatives)*, 2015/16, 34372, no. 3, p. 75; *Dutch Parliamentary Papers II (House of Representatives)*, 2015/16, 34372, no. 6, p. 119.

how it can be justified to use the far-reaching measures of criminal law for ensuring compliance with the civil standard of *pacta sunt servanda*. One may conclude, in light of the previous, that the parliamentary proceedings on the criminalisation of swindle and online trade fraud provide some insight into the reasoning on whether and to what extent breaches of sale contracts should be criminalised. However, not all criminalisation principles have been addressed (e.g. the proportionality principle) and, furthermore, one could discuss whether the addressed principles have sufficiently been discussed (e.g. efficiency principle, subsidiarity principle). The question arises whether the application of all of De Roos' criminalisation principles, with Haenen's modifications included, would lead to a similar conclusion to the problem at hand. In the following, these criminalisation principles will be applied to the problem of breaches of sale contracts.

There has been a relative increase in the number of breaches of sale contracts of 19% in two years. In 2014, 480,000 Dutch citizens have been scammed when buying or selling goods online. Breaches of sale contracts inflict harm by violating the property interest of a person. Individual damages are usually low (i.e. € 300); the total amount of breaches of sale contracts are an estimated € 135 million each year. Breaches of sale contracts do not only breach private interests; they breach the trust people have in trade, which leads to fewer sales, damaging the economy as a whole (public harm). The conduct may also be qualified as wrongful conduct: the perpetrator intentionally breaches the contract to gain a financial advantage.

Is the use of criminal law proportionate to the severity of the crime? According to the legislator and the *Hoge Raad* only severe cases of deceitful conduct should invoke criminal liability. It is hard to argue that the mere intentional non-performance of one of the obligations of the purchase agreement would qualify as a severe case of deceitful conduct and moreover, that these breaches should fall within the scope of article 326 Sr. The parliamentary papers of swindle and online trade fraud argue that criminalisation is needed due to the high number of cases, the total amount of damages and (implicitly) the damaging effect the conduct has on trade. Thus, the consequences of the conduct legitimize the criminalisation of breaches of sale contracts and not the severity of the conduct.

The application of the subsidiarity principle poses the question of whether strengthening the civil procedure provides for a better solution to the problem in view of the many civil remedies that civil law offers.[92] The main obstacle for starting a civil procedure against the non-compliant party is the lack of means within the civil procedure to trace the non-compliant party. The internet enables the perpetrator to stay anonymous. Additionally, under the civil

92 For example by implementing a small claims procedure. Compare in this aspect Regulation 2015/242/EU establishing a European small claims procedure and a European order for payment procedure.

procedure the costs for tracing the other party are (initially) for the claimant. Moreover, starting a group action is only possible when knowing the other claimants. In view of that, criminal law may provide a better solution. Within the criminal procedure, the police are responsible to trace the perpetrator. Furthermore, the criminal procedure enables victims to join the criminal procedure as a claimant, which provides for easy compensation of damages. Lastly, criminal law is deemed to have a deterrent effect.

However, in light of scarce resources the deterrent effect might not be as effective. According to the parliamentary papers on online trade fraud, the *openbaar ministerie* and police can tackle 1600 fraud cases each year, the capacity of which is divided between online and offline fraud. With 480,000 breaches of sale contracts in 2014, it is needless to say that they would not be able to investigate and prosecute each single breach of a sale contract. Consequently, the risk of getting caught will remain low. Therefore, the criminalisation of breaches of sale contracts might not be as effective.

To conclude, what is the preliminary outcome when balancing these arguments for and against criminalisation? Looking at the principles of harm and wrong, the proportionality principle and the subsidiarity principle one may conclude that breaches of sale contracts should invoke criminal liability. However, an important argument against criminalisation would be that tackling breaches of sale contracts through criminal law might not meet the principle of efficiency by a lack of capacity within the criminal justice system. Lack of efficiency might be a convincing reason not to tackle breaches of sale contracts through criminal law. Nevertheless, for the legislator the lack of efficiency does not seem to be an obstacle for criminalisation: it might just be what weight you give to it.

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